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Citizenship within and across the boundaries of the European Union

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1. Introduction

The concept of citizenship operating in Europe today is both multilevel and composite in character. It comprises a range of different legal statuses at the international, supranational, national and subnational level – as well as the level of individual and group identity – with various normative systems cutting across each other and, from time to time, coming into conflict. In important respects, however, these different elements are mutually constitutive. Samantha Besson and André Utzinger² explain the evolution of a composite ‘European’ citizenship in an interesting way. They argue that changes have not occurred

‘by supplanting national citizenships and replacing them with an overarching supranational citizenship of the Union... Rather, citizenship remains strongly anchored at the national level in Europe albeit in a different way. The change is both quantitative and qualitative. First, citizenship in Europe has become multi-levelled as European citizens are members of different polities both horizontally across Europe (other Member States) and vertically (European transnational, international and supranational institutions). Second, national citizenship in and of itself has changed in quality and has been made more inclusive in its scope and mode of functioning. Union citizenship adds a European dimension to each national *demos* and, to a certain extent, alters national citizenship in reconceiving it in a complementary relation to other Member States’ citizenships.’

To this analysis, must be added the external dimension, for it is important to emphasise that the effects of EU citizenship do not stop precisely at the outer borders of the EU, not least because of the variable rules on citizenship acquisition which the Member States have in place. These affect different groups of third country nationals unequally.³ Nor are these effects experienced equally within the EU. For example, nationals of post-2004 and post-2007 Member States from Central and Eastern Europe are subject to a

¹ This paper draws upon a longer paper entitled ‘The constitutional mosaic across the boundaries of the European Union: citizenship regimes in the new states of South Eastern Europe’, prepared for N. Walker, S. Tierney and J. Shaw (eds.), *Europe’s Constitutional Mosaic*, Oxford, Hart Publishing, 2010, forthcoming. It is based upon work ongoing in the context of the European Research Council-funded CITSEE project: *The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia* (ERC Advanced Grant 230239). See <http://www.law.ed.ac.uk/citsee> for more details of CITSEE, including material such as Country Profiles which have been used in the preparation of this paper. It also draws on the EUCITAC/EUDO-Citizenship Observatory Project funded by EC Commission DG JLS (<http://eudo-citizenship.eu>). The financial support of the funding bodies is acknowledged with thanks.

² S Besson and A Utzinger, ‘Towards European Citizenship’, (2008) *The Journal of Social Philosophy* 185 at 196; see also G Delanty, ‘European Citizenship: A Critical Reassessment’, (2007) 11 *Citizenship Studies* 63 and N Walker, ‘Denizenship and Deterritorialisation in the European Union’, in H Lindahl (ed), *A Right to Inclusion and Exclusion*, (Oxford, Hart Publishing, 2009) 261.

³ E Rigo, ‘Citizenship at Europe’s Borders: Some Reflections on the Post-colonial Condition of Europe in the Context of EU Enlargement’, (2005) 9 *Citizenship Studies* 3.

transitional regime in relation to the effects of the provisions on the free movement of labour which restrict their rights as EU citizens.

This paper provides a brief introduction to the significance and meaning of citizenship in the EU context in contemporary Europe; this serves as a lead into a discussion of examples of how this concept has impacted upon the new states now existing on the territory of the former Yugoslavia. This is a region which has not, for the most part, conformed to the patterns of post-socialist transition, which are visible in the states of central and eastern Europe which acceded to the EU in 2004 and 2007. Although there has been relative little attention paid thus far to citizenship questions in academic work addressing the dissolution of Yugoslavia,⁴ in fact questions of membership definition have been of acute relevance in the context of a painful transition from a single multinational and multi-ethnic state, comprised of republics most of which were themselves (increasingly) multi-ethnic in character, into seven often ethnically defined states. This is all the more so because there were increasingly large numbers of transnational families in Yugoslavia as a result of labour migration after the second world war and the impact of the policies of the Yugoslav National Army. Such families, along with ethnic groups that have suffered specific policies of ethnic cleansing in a number of different contexts (e.g. Serbs in Croatia; Croats and Bosniacs in Bosnia), have often been internally or indeed externally displaced throughout the 1990s and into the 2000s.

2. The significance and meaning of citizenship in the EU context

Although scholarly opinion is divided as to the precise significance of national citizenship in an increasingly globalised world,⁵ the European Union's complex scenario of multilevel citizenship has paradoxically contributed to strengthening the significance of holding the citizenship of one of the Member States, when compared to holding the citizenship of a third country (or indeed of a candidate state). It has not, in that sense, contributed to the erosion of national citizenship as an institution despite the activist nature of much of the European Court of Justice's recent case law in this area. The Court's case law has had little to say directly about (national) citizenship; indirectly, however, it has strengthened the alternative reference point of residence rather than national belonging at least for those EU citizens who are resident in other Member States, by extending residence-based access to certain benefits and educational entitlements⁶ and by imposing restrictions on the exercise of national competences *vis-à-vis* mobile EU citizens in some surprising areas, such as the national rules which

⁴ But see, significantly, I Štiks, 'Nationality and Citizenship in the Former Yugoslavia: From Disintegration to European Integration', (2006) 6 *Southeast European and Black Sea Studies* 483; other work by Štiks includes: I Štiks, *A Laboratory of Citizenship: Nations and Citizenship in the Former Yugoslavia and its Successor States*, PhD Dissertation, Northwestern University (June 2009)/Sciences Po, Paris (March 2009); I Štiks, "'Old habits die hard": The Europeanisation of the Citizenship Policies in New Balkan States', paper presented at the Conference on *EU Enlargement and Institutional Reforms in Southeast Europe*, Freie Universität Berlin, May 2009; F Ragazzi and I Štiks, 'Croatian citizenship: from ethnic engineering to inclusiveness', in Bauböck *et al* above n.30, 339. See also Medved, above n.30.

⁵ For a somewhat partial review of the debates see R Hansen, 'The poverty of postnationalism: citizenship, immigration, and the new Europe', (2009) 38 *Theory and Society* 1; see also C Joppke, 'The vulnerability of non-citizens', (2009) 39 *Perspectives on Europe* 18; C Joppke, 'Transformation of Citizenship: Status, Rights, Identity', (2007) 11 *Citizenship Studies* 37.

⁶ Case C-85/96 *Martínez Sala v Freistadt Berlin* [1998] ECR I-2691; Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193.

regulate surnames.⁷ It has also permitted the portability outside the national jurisdiction of some benefits and entitlements, in order not to penalise EU citizens for exercising free movement rights.⁸ Even so, Member States still remain substantially unconstrained to regulate access to and loss of national citizenship as they wish.

Thus in the EU, the root of citizenship lies at the national level. ‘Citizenship of the Union’, introduced by the Treaty of Maastricht in 1993, is limited in its personal scope by reference to the national citizenship laws of the Member States. EU citizens are the nationals of the Member States, according to Article 9 TEU,⁹ and Union citizenship is intended to have a secondary function in comparison to national citizenship:

‘Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.’

The same point is repeated in Article 20 TFEU.

The Court of Justice has had some limited opportunities in which to elaborate further upon the significance of the connection between national citizenship and Union citizenship and thus the effects of national regulation of access to and loss of national citizenship. In *Micheletti*,¹⁰ even before the introduction of Union citizenship, the Court confirmed that while Member States remain competent alone to define the scope of their citizenship laws in order to determine who are their citizens, when the host state is faced with a person who has the nationality of a Member State and also the nationality of a third state, it is obliged to recognise that part of a person’s dual (or multiple) nationality which gives them access to free movement and non-discrimination rights. Post-Maastricht this means that Member States must recognise the Union citizenship of nationals of other Member States also holding the nationality of a third state.

The Court confirmed the autonomy of the Member States in *Kaur*,¹¹ holding that in order to determine who was a national of the UK for the purposes of determining the scope of the Treaty *ratione personae*, it was essential to refer to the 1972 and 1982 declarations made by the UK and appended to the treaties stating which persons it regarded as its citizens for the purposes of the application of EU law (even though declarations are not normally regarded as having the same value as the EU Treaties themselves). Finally, in the pending case of *Rottmann*,¹² Advocate General Maduro has recommended a cautious approach by the Court of Justice to the question of withdrawal of the nationality of a naturalised citizen by a Member State (Germany), where that nationality has been gained by fraudulent means. The Court should not rush to intervene even where the withdrawal would result in the person ceasing to be an EU citizen at all

⁷ Case C-148/02 *Garcia Avello v Belgian State* [2003] ECR I-11613; Case C353/08 *Grunkin and Paul v Grunkin-Paul and Standesamt Stadt Niebüll* [2008] ECR I- 7639.

⁸ E.g. Case C-11/06 *Morgan v Bezirksregierung Köln* [2007] ECR I-9161; Case C-224/98 *D’Hoop v Office National de l’Emploi* [2002] ECR I-6191.

⁹ References are to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) with their post-Lisbon formulation and numbering unless otherwise indicated.

¹⁰ Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

¹¹ Case C-192/99 *R v Secretary of State for the Home Department, ex parte Kaur* [2001] ECR I-1237.

¹² Case C-135/08 *Rottmann v Freistaat Bayern*, Opinion of Advocate General Maduro of 30 September 2009.

because he would be, at least in the interim, stateless. This was because Rottmann would not automatically reacquire his previous national citizenship (Austrian), which was also one which conferred Union citizenship, and which had been renounced in order to effect naturalisation as a German. At the same time, Maduro did remind the Member States that while they are free to set the rules on acquisition or loss of nationality as matters falling within their exclusive competence, they none the less must act in such a way which will ensure that they do not otherwise breach their EU law obligations. One example could be withdrawal of nationality in circumstances where this breached EU law, e.g. withdrawal of nationality as a result of joining a trades union or exercising certain political freedoms. He also suggested that the case of collective naturalisations of groups of third country nationals (e.g. from kin states) might be one where there was a breach of EU law, notably the principle of loyalty under Article 4 TEU (ex Article 10 EC). For such an action would inevitably impact upon other Member States because of the effects of EU citizenship, EU based free movement rights and associated rights to non-discrimination on grounds of nationality.

All of this confirms that Union citizenship is rather different in character to national citizenship. As a legal status, citizenship of the Union gathers together a set of rights largely associated with the exercise of free movement rights, including political rights giving an EU citizen the rights to stand and vote under the same conditions as nationals when resident in a Member State other than the one of which she is a national, in both local elections and European Parliamentary elections. Under the reforms introduced by the Treaty of Lisbon, the language of citizenship is linked increasingly to the language of democracy and representation, in order to insist, for example, that the European Parliament is the Parliament of Union citizens.¹³ Thus in future we may see the concept of citizenship in the EU context filled out to a greater extent and made more meaningful for 'static' citizens. However, so far as concerns the current legally enforceable rights, it is essentially in relation to the mobile European citizen that the specific impact of EU law can be felt and has indeed been felt in a series of cases which have gradually eroded various aspects of the welfare and immigration 'sovereignty' of the Member States.¹⁴ According to the Court of Justice, 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'¹⁵ It has repeated this point in numerous judgments since 2001. Clearly, at the present time, this statement must be read in the light of the limited scope of Union citizenship, which is constrained by reference to the limited competences of the Union itself as determined by the founding Treaties, but so far as concerns mobility *within* the EU and across the borders of the Member States for Union citizens it is increasingly the reference point of residence that

¹³ J Shaw, 'The constitutional development of citizenship in the EU context: with or without the Treaty of Lisbon', in I Pernice and E Tanchev (eds), *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, (Baden-Baden, Nomos, 2009), 104.

¹⁴ See *Martinez Sala* and other cases cited above in relation to welfare sovereignty; as regards immigration sovereignty, see Case C-413/99 *Baumbast and R* [2002] ECR I-7091; Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9924, C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

¹⁵ *Grzelczyk*, above n.6 para. 31.

matters most, rather than national citizenship.¹⁶ In that sense, Union citizenship could be called a species of *transnational* citizenship.¹⁷

Meanwhile, for those who find themselves at or beyond the margins of the territory of the Union, national citizenship as a status remains decisive because it gives access to the full benefits of Union citizenship. For the ‘new’ Member State citizens, the situation is precarious. Much has been made of the limited free movement rights granted to citizens of the Member States which joined the Union in 2004 and 2007. Most Member States have applied transitional periods in order to restrict labour market access for Union citizens, whose status has widely been characterized as that of second class citizens.¹⁸ Thus national citizenship matters here, as it does for third country nationals. In that sense, Union citizenship is definitely neither a form of *postnational* membership itself,¹⁹ nor a mechanism which in and of itself will lead to the withering away of the significance of national citizenship – even – as *Rottmann* shows, for citizens of the ‘old’ Member States.

In states which are (still) outside the external borders of the European Union, individuals can become Union citizens in two ways: either by gaining the nationality of an existing Member State (with all the attendant difficulties associated with naturalization, such as contending with possible requirements of renunciation or release,²⁰ passing citizenship /language tests, and demonstrating possible ‘virtue’ requirements), or because the state of which they are a national itself becomes a Member State. It is important to note that many of the states at or just beyond the boundaries of the present EU are new, or renewed states, with citizenship regimes and rules on acquisition and loss of national citizenship which have been devised or substantially amended during the twenty years or so which have elapsed since the fall of the Berlin Wall, the collapse of the Soviet Union and the end of the Cold War. Some of these are (sometimes fragile and weak) states with unstable and changing citizenship regimes (often overlapping in important ways the regimes of other neighbouring states which may have originated in a single state of origin), and in some cases they are states where there are contested sovereignty claims on the part of different national groups or continuing protectorate statuses pursuant to situations of war and violent conflict. Kosovo and Bosnia-Herzegovina offer pertinent examples here.

In the post-1989 ‘transition’ states, there are frequently groups of national minorities, whose status has been formed by a combination of historical population flows combined with boundary changes which have occurred throughout the twentieth century and into

¹⁶ G Davies, ‘“Any Place I Hang My Hat?” or: Residence is the New Nationality’, (2005) 11 *European Law Journal* 43.

¹⁷ J Fox, ‘Unpacking “Transnational Citizenship”’, (2005) 8 *Annual Review of Political Science* 171.

¹⁸ N Rollason, ‘Citizenship and the Expanding European Union: The Rights of New EU Nationals’, in A Baldaccini, E Guild and H Toner (eds), *Whose Freedom, Security and Justice. EU Immigration and Asylum Law and Policy*, (Oxford, Hart Publishing, 2007).

¹⁹ This term is particularly associated with the work of Yasemin Soysal: Y Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, (Chicago/London, University of Chicago Press, 1994). See also J Habermas, ‘Citizenship and National Identity’, in B van Steenbergen (ed.), *The Condition of Citizenship*, (London, etc.: Sage, 1994).

²⁰ For a reflection on the implications of this in an intra-EU context see D. Kochenov, ‘A Glance at Member State Nationality – EU Citizenship Interaction’, forthcoming 2010, draft version available at http://www.unc.edu/euce/eusa2009/papers/kochenov_05E.pdf.

the twenty-first. 'Immigration' in its twentieth and twenty-first century guises has not constituted these groups of minorities, but rather other historical forces, generally outwith the agency of individuals, who find their formal status as citizens changing without them changing their location. In such circumstances, concepts such as citizenship and nationality have quite different meanings, even though it may be overly simplistic to talk of an East-West divide in the context of citizenship.²¹

It should be clear, therefore, that the interaction between EU citizenship and the national citizenships of Member States, candidate states and putative candidate states is a subtle and evolving one.

3. The impact of EU citizenship in the context of enlargement: some examples from the former Yugoslavia

Against that background, the case of the seven states which are now to be found on the territory of the former Socialist Federal Republic of Yugoslavia offer eloquent examples the effects of transition, disintegration and partial re-integration processes in relation to the evolution and operation of citizenship regimes in new states. In an earlier paper on citizenship and enlargement more generally,²² examples were presented of effects which occur in relation to political culture and practices in both the EU and the accession states as a result of enlargement. It focused specifically on resonances emerging from debates about the political participation of non-nationals in local elections, which are engaged not only in relation the exigencies of EU law, which requires Member States to introduce municipal voting rights for resident nationals of other Member States, but also in relation to wider debates and the integration of non-nationals and immigrants.²³ The examples in this paper concentrate rather on the interaction with the national rules on loss and acquisition of citizenship and on the issues raised by that most basic of civic and economic freedoms: freedom of movement. There are two focuses: the impact of international norms on the citizenship regimes of these seven states, and the dynamics of overlapping citizenship regimes which stem – by direct or indirect means – from a single root, the citizenship of the Socialist Federal Republic of Yugoslavia, with its dual system of federal and republican citizenship.

It is important to remember, however, when discussing the impact of 'Europe' in relation to the Western Balkans, and the putative 'Europeanisation' of the former Yugoslav states, that while the EU has been and remains an important 'player' in the Western Balkans, there are numerous other international and regional organizations which have been engaged in this region in the process of trying directly or indirectly to sow the seeds which would lead to enhanced recognition and implementation of key norms associated with liberal and democratic constitutionalism under the rule of law. These include norms stemming from international and European human rights treaties, as well as more inchoate norms of good governance, democracy and neighbourly relations. The 'interplay' between these institutions, if not necessarily the norms which

²¹ See the debate on the East-West divide in the EUDO-Citizenship Forum: <http://eudo-citizenship.eu/cit-forum/>.

²² J Shaw, 'Citizenship and Enlargement: The Outer Limits of EU Political Citizenship', in C Barnard and O Odudu (eds), *The Outer Limits of EU Law*, (Oxford, Hart Publishing, 2009).

²³ See also more generally J Shaw, *The Transformation of Citizenship in the European Union*, (Cambridge, Cambridge University Press, 2007).

they have been seeking to bring into play, has not always been comfortable.²⁴ A non-exhaustive list of such organisations must include NATO, the Council of Europe (especially the Venice Commission but also other relevant treaty frameworks adopted under its aegis such as the European Convention on Nationality and the Framework Convention on the Protection of National Minorities, and their respective institutional enforcement mechanisms), the OSCE, the Stability Pact for South Eastern Europe and its successor, the Regional Cooperation Council, the UN Security Council, the UNHCR, the UNDP and other UN agencies, not to mention numerous special-purpose instruments and institutions of the international community and of the EU and its Member States, specifically designed to bring conflict to an end and to deal with post-conflict situations in the protectorate or quasi-protectorate states of Bosnia and Kosovo or to deal with war crimes and crimes against humanity (e.g. International Criminal Tribunal for the Former Yugoslavia). The region and its states have been the subject of numerous international plans, some of which have been given the legal force of treaties or UN Security Council Resolutions, but by no means all. All these plans none the less have been the means through which norms have been identified for more or less explicit transplantation into the internal legal sphere, or into transborder relations between states. Many of these have impacted directly or indirectly upon citizenship questions, even though the states are ostensibly free under international and European law to set their own norms.

Adoption of, and compliance with, international norms has had important impacts upon citizenship regimes. With the exception of Kosovo, all the new states – as they emerged – have become members of the United Nations and the Council of Europe. This has implied – under the aegis of the latter organisation – signing and ratifying key treaties such as the European Convention on Human Rights and Fundamental Freedoms and permitting the right of individual petition to the judicial institutions of Strasbourg.

ECHR norms have a limited impact upon citizenship rules and regulations as such. The Court of Human Rights has consistently held that ‘no right to acquire or retain a particular nationality is as such included among the rights and freedoms guaranteed by the Convention or its Protocols.’²⁵ The ECHR does, however, impact upon the exercise of citizenship rights consequent upon citizenship, especially political rights. This point is well illustrated by a case brought against Moldova,²⁶ in which the applicants challenged Moldovan rules which banned dual nationals from holding public posts, including posts as Members of Parliament. The citizenship rules themselves remain unaffected. This would mean that Moldova would be at liberty, like other states, to correct the human rights violation by abolishing dual nationality. Whether or not to allow dual nationality is a free choice of states; having chosen to allow it, Moldova is under an obligation to treat all citizens equally. A similar case is *Sejdić and Finci*,²⁷ an application brought against Bosnia by members of the Roma and Jewish communities

²⁴ See U. Caruso, *Interplay between the Council of Europe, OSCE, EU and NATO*, 2007, Report compiled for the MIRICO FP6 project available at <http://www.eurac.edu/NR/rdonlyres/4EA381B7-95DD-4750-A2D4-528E463863C3/0/ReportoninterplayWEB.pdf>.

²⁵ See, for example, a case concerning a former Yugoslav Republic: *Makuc and others v Slovenia*, Application no. 26828/06, partial decision on admissibility of 31 May 2007, [2007] ECHR 523, at para. 160.

²⁶ *Tănase and Chirtoacă v Moldova*, Application no. 7/08, 18 November 2008.

²⁷ *Sejdić and Finci v Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, judgment of the Grand Chamber of 22 December 2009.

successfully alleging racial and ethnic discrimination because of the effects of the Bosnian post-Dayton constitution, which limits certain political rights, such as the right to stand for the collective Bosnian Presidency, to self-declared members of the three 'constituent peoples' of Bosnia (the Bosniacs, Croats and Serbs). Again, all citizens must be treated equally, and *Sejdić and Finci* represents an important first case on the application of the freestanding non-discrimination principle in Article 1 of Protocol No. 12 of the ECHR.

One of the most infamous citizenship 'incidents' to result from the dissolution of Yugoslavia has been brought before the Court of Human Rights, and awaits a final judgment.²⁸ The *Makuc* case concerns the fate of citizens of former Yugoslav republics other than Slovenia who were resident there on the date of independence, and who – for whatever reason – either could not or would not apply for Slovenian citizenship under the conditions prescribed by Section 40 of the 1991 Slovenian Citizenship Act. There were three requirements which they needed to meet: they must have acquired permanent resident status in Slovenia by 23 December 1990, be actually residing in Slovenia and have applied for citizenship within six months after the Citizenship Act entered into force (i.e. 28 February 1992). Those who did not apply, or who did apply and whose applications were rejected, were – on the orders of the Ministry of Interior – erased from all registers from that date and effectively rendered non-persons. Having repeated, as noted above, its well-known mantra concerning the limited effects of the ECHR in relation to the 'right' to a nationality, the Court none the less noted that an arbitrary denial of citizenship – such as that alleged by the applicants who were all erased – could raise issues under Article 8 of the Convention because of the possible impact upon the private life of the applicant.²⁹ In this case, because the actual 'erasure' took place before Slovenia acceded to the Convention in 1994, the Court declared that part of the application inadmissible from a temporal perspective. However, it did decide to adjourn for further examination and argument issues related to the denial of a retrospective right of permanent residence for those of the erased who did eventually succeed in establishing the legality of their residence in Slovenia and the continued denial of an effective remedy (notwithstanding two Slovenian Constitutional Court judgments condemning the actions of the Government³⁰). It remains to be seen what position the Court will take on these matters. Felicita Medved³¹ interprets the case of the Erased as part of a more general drift in Slovenia away from a civic conception of citizenship, visible in the initial determination of the citizenry and influenced by international 'best practice' towards a more ethnic-nation approach. This latter has more in common with the approaches taken by most of the other new states of South Eastern Europe.

By comparison with the ECHR, acceptance of other conventions specifically concerned with questions of nationality and citizenship is patchier. Bosnia and Croatia have signed but not ratified the core European norms on nationality, the 1997 European Convention on Nationality.³² Only Macedonia has actually ratified the Convention, and the decision

²⁸ See *Makuc* above n.25.

²⁹ See *Makuc* above n.25 at para. 160.

³⁰ For more details see V Jalušič and J Dedić, '(The) Erasure – Mass Human Rights Violation and Denial of Responsibility: The Case of Independent Slovenia', (2008) 9 *Human Rights Review* 9; F Medved, 'From civic to ethnic community? The evolution of Slovenian citizenship', in R Bauböck, B Perchinig and W Sievers (eds), *Citizenship Policies in the New Europe*, 2nd edn (Amsterdam, Amsterdam University Press, 2009), 305.

³¹ Medved, above n.30.

³² ETS No. 166.

to do so in 2003 was a central element in Macedonia's 'civic' and 'non-ethnic' redefinition of its constitution and its citizenship law in the aftermath of the Ohrid Framework Agreement of 2001 which brought to an end an armed rebellion by Macedonia's substantial Albanian community which threatened the very survival of the state.³³ Only Montenegro has signed the more recent 2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession.³⁴ On the other hand, reflecting concerns on the status of minorities which express themselves in particular in the context of EU conditionality, all of the states except Kosovo have signed and ratified the 1995 Framework Convention on the Protection of National Minorities,³⁵ a convention which it is safe to say was specifically drafted with post-1989 Central and Eastern Europe in mind. Like the ECHR, however, this is not a text which directly addresses itself to issues of citizenship (or statelessness).

Thus far, in its condition of internationally supervised independence, Kosovo has not been able to join any key international organisations concerned with human rights and fundamental freedoms, including the United Nations and the Council of Europe. As it requires a two thirds majority of members of the Council of Europe for accession, and it has been recognised by more than two thirds of the CoE's 47 member countries, accession to the latter became a prospect in 2010. In terms of fundamental rights norms, however, the scenario in relation to Kosovo is more a case of category c) discussed below, as Kosovo's explicit adhesion of international human rights standards was written in to the Ahtisaari Plan or 'Comprehensive proposal for the Kosovo Status Settlement' of 2007, which in turn largely determined the contours of Kosovo's post independence Constitution as the basis for a multi-ethnic state based on civic rather than ethnic principles.³⁶

These more general questions of compliance offer the context in which we must approach the question of conditionality in relation to EU accession. It would be wrong to view conditionality too simplistically, as either coercive or voluntary in character. Conditionality engages a complex set of pressures and motivations on the part of the actors on both sides of the bargain.

All the states of the former Yugoslavia have a 'European perspective'. Slovenia, of course, is already a member. Croatia expects to conclude its membership negotiations and accession treaty in 2010, with a view to accession in 2012. Macedonia has been recognised as a candidate state since 2005, but has not started negotiations as yet. Montenegro and Serbia have both applied for membership but have not yet been recognised as candidate states. Bosnia lags somewhat behind, not least because of its internal political problems. Kosovo, meanwhile, has not been recognised by all 27 EU Member States and has no formal contractual relations with the EU as such, as its status is strictly treated under UNSCR 1244, rather than by reference to its unilateral declaration of independence in 2008. It plays host to the largest civilian mission that the EU has ever assembled – EULEX – which is an essential component in Kosovo's regime of supervised independence. Accession to the EU is therefore a distant vision.

³³ See at n.**Error! Bookmark not defined..**

³⁴ ETS No. 200.

³⁵ ETS No. 157.

³⁶ For details of the Ahtisaari Plan see the website of the United Nations Special Envoy for Kosovo: <http://www.unosek.org/unosek/en/statusproposal.html>. See further below at n.**Error! Bookmark not defined..**

On the other hand, potential accession to the EU implies not just direct pre-accession compliance with the rules of EU law (as well as all the necessary economic and political adjustments), but also other forms of compliance at earlier stages of looser integration as the potential candidate state is guided along a Commission-devised ‘roadmap’ towards integration, e.g. through the Stabilisation and Association Process. One of the aims of such ‘roadmaps’, such as those in relation to visa liberalisation, is to render the process ostensibly more technical and less political, although one of the by-products of such an approach is that it reveals the inconsistency of EU policies. Western Balkan states have been required to issue biometric passports to achieve visa liberalisation, and only those citizens of the three states which achieved Schengen visa liberalisation in December 2009 who actually possess biometric passports can benefit from the new regime. However, Croatia does not yet issue biometric passports, yet its citizens have visa free travel.

Citizenship laws and policies fall strictly outwith the scope of EU law. In that respect, Member States themselves are – as we saw above – relatively unconstrained in their implementation of policies on acquisition and loss of citizenship, subject to compliance with obligations otherwise arising under EU law. However, for candidate states broader human rights compliance is supposed to be a heavier burden, where a substantial impact on, for example, problematic citizenship policies might expect to be seen. Yet in this respect there has been a signal failure to apply conditionality consistently. This concerns the singular failure of the EU institutions to use Slovenia’s pre-accession process in order to force progress in relation to a situation which has not only been characterised as a serious human rights violation by organisations such as Amnesty International³⁷ and the Justice Initiative of the Open Society Institute,³⁸ but which has also drawn negative comment because of its effects in relation to statelessness from actors such as the Council of Europe Commissioner for Human Rights. But the rather hidden fate of the Erased failed to make a substantial dent in the overall success rate of Slovenia, which has been widely seen in international spheres as the only success story of the dissolution of Yugoslavia and a deserving member of the ‘2004 team’ – i.e. the first post-1989 enlargement of the EU towards Central and Eastern Europe.³⁹ On the other hand, Bosnia will be expected to implement constitutional reforms to correct the human rights violation identified in the *Sejdić and Finci* judgment⁴⁰ on the political rights of non-members of its ‘constituent peoples’ as a benchmark of progress towards accession.

Visa liberalisation policies also have effects upon the citizenship policies of the former Yugoslav states. Since the liberalisation policy after the amendments of December 2009⁴¹ still excludes two of the six states which remain outside the EU (Bosnia and

³⁷ See, most recently, Amnesty International Briefing, Slovenia: Submission to the UN Universal Periodic Review: Seventh session of the UPR Working Group of the Human Rights Council, February 2010, AI Index EUR 68/004/2009, 8 September 2009.

³⁸ See U Boljka, *The Unfinished Business of the Fifth Enlargement Countries. Country Report: Slovenia*, Open Society Institute – Sofia, European Policies Initiative, 2009, 16-17.

³⁹ A similar failure in relation to the situation of the Russian minorities and stateless persons in Estonia and Latvia before 2004 can also be observed; see Shaw, above n.22 at 70-83.

⁴⁰ See above n.27.

⁴¹ Council Regulation 1244/2009 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2009 L336/1, based on a

Kosovo), it will clearly affect the motivations of citizens of those states to seek other passports – especially since Bosnia and Kosovo are two of the states which are wholly tolerant of dual and indeed multiple nationality.⁴² For example, it is estimated that there are more than 500,000 Croatian passport holders resident in Bosnia – a relic of the willingness of the Croatian authorities to give passports to non-resident citizens whose acquisition of Croatian citizenship after independence was specifically facilitated in earlier versions of its citizenship law.⁴³ This policy sees Bosnian Croats as full members of the Croatian nation and is consistent with a general Croatian policy of using ethnic preferences in order to determine the limits of its citizenship laws. Likewise, Bosnian Serbs will be able to acquire Serbian passports, either by establishing a ‘residence’ in Serbia or by taking advantage of a citizenship law which has become more open towards granting passports to non-resident co-ethnics since Serbia constitutionally redefined itself as ‘the state of the Serbian people and of all citizens living in Serbia’.⁴⁴ It seems that only the third ‘constituent people’, Bosnia’s Muslim citizens or ‘Bosniacs’, will be likely to continue to require visas in the future in order to access the Schengen area, especially those who suffered both the consequences of war and post-war reconstruction and were unable to obtain the passports of Western states as did many Bosnian refugees who left the country. This reinforces, unfortunately, a perception that the EU does not recognise – in its dealings with Bosnia – the fact that it was this group who suffered the most during the 1992-1995 wars in Bosnia.

In the context of Kosovo and Serbia, the EU has adopted a set of measures differentiating between different ‘classes’ of citizenship which seems difficult to justify in view of fundamental principles of non-discrimination. Paragraph 4 of the preamble to Regulation 1244/2009⁴⁵ states:

For persons residing in Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 (referred to as Kosovo (UNSCR 1244)) and persons whose citizenship certificate has been issued for the territory of Kosovo (UNSCR 1244), a specific Coordination Directorate in Belgrade will be in charge of collecting their passport applications and the issuance of passports. However, in view of security concerns regarding in particular the potential for illegal migration, the holders of Serbian passports issued by that specific Coordination Directorate should be excluded from the visa-free regime for Serbia.

The casual reference to ‘illegal migration’ as the justification for drawing this distinction has the effect of continuing the stigmatization of that part of the Balkans, for visa liberalisation only affects short term travel and not long term residence or work regimes. Those determined to travel illegally to the EU and to work there will continue to do so, regardless of the existence of the visa regime. The statement also has implications for both Serbians and Kosovans, and indicates that EU policies can

Commission proposal of 15 July 2009: CON(2009) 366. The UK seems likely to remove the visa requirement one year later than the Schengen zone states.

⁴² See I Štiks “‘Being Citizen the Bosnian Way’: Transformations of Citizenship and Political Identities in Bosnia-Herzegovina”, in this volume; G Krasniqi, Report on Kosovo, available from <http://eudo-citizenship.eu> under Country Profiles.

⁴³ See Ragazzi and Štiks, above n.4.

⁴⁴ See Štiks, *Laboratory of Citizenship*, above n.4, 318-210.

⁴⁵ See above n.41. See also Article 1(2) of the Regulation.

themselves be affected by domestic contingencies such as the capacity to distinguish between different categories of Serbian documents. As Serbia does not recognise the independence of Kosovo, and on the contrary sees that territory as still being subject to its sovereign jurisdiction, citizens of Kosovo are – simultaneously – citizens of Serbia.⁴⁶ Indeed, for pragmatic reasons, many Kosovans have retained Serbian documents hitherto, and this measure appears to be a step intended to reduce the benefits for them of so doing. Equally, of course, this measure has the effect of removing ethnic Serbian Kosovans – some of whom have also taken up Kosovan documents as well as Serbian ones, also for pragmatic reasons – from the ambit of the visa liberalisation regime. To that extent, Serbia appears to have agreed to a regime which may benefit the majority of its population, but which discriminates between different groups of citizens, both on the basis of residence and on the basis of ethnicity, and it will be interesting to see whether it is challenged internally. Of course, either group can seek to establish a ‘residence’ in Serbia, spurious or otherwise, and seek to obtain documents through that means. Indeed, as is often commented, those who seek ways around the law, or who are prepared to act illegally, are rarely those who are inconvenienced or stigmatized by visa regimes. On the contrary, it is ‘ordinary’ citizens who bear the brunt.

Equally, one of the factors pointing in favour of early implementation of visa liberalisation for Macedonia was the fact that such a policy would relieve some of the pressure which has arisen because of the willingness of Bulgaria to give passports to Macedonians – whom some in Bulgaria see in any event as belonging to the Bulgarian nation – on the basis of rather spurious residence qualifications in Bulgaria, or because they have studied at a University in Bulgaria. Again, this may be evidence of domestic policies spilling over into the EU arena. However, since Bulgaria is already a Member State – albeit one subject to transitional restrictions on freedom of movement for labour purposes – and Macedonia has not even begun its accession negotiations, the likelihood is that this route will continue to be seen as an attractive one for some Macedonians in order to acquire a passport more highly valued within the EU context.⁴⁷

Turning now to the ‘horizontal’ effects of the overlapping citizenship regimes, we can see that the root of these new regimes in that of the former Yugoslavia, along with cross-republic mobility, transnational family ties and more historical links which developed over centuries in the Balkans, explains why there are often points of overlap and friction between the citizenship regimes of these states, of an extent and an intensity which goes beyond other neighbouring states (e.g. Belgium/France; Benelux states; Nordic states).

These factors account, for example, for the importance and high prevalence of dual nationality as between pairs of states (e.g. Croatia/Bosnia; Croatia/Serbia; Serbia/Bosnia; Serbia/Kosovo; Macedonia/Bulgaria, etc.) as well as with those third countries permitting dual nationality which have been the most common destinations for emigrant Yugoslavs and citizens of post-Yugoslav states. In that context, the position in Montenegro – which acquired its independence in 2006 – is of considerable interest. Montenegro refuses to permit dual citizenship, most particularly because of the relationship with Serbia (up to 30% of the Montenegrin population identify themselves

⁴⁶ See Krasniqi, above n.42.

⁴⁷ See L Spaskovska, Report on Macedonia, available at <http://eudo-citizenship.eu>, under Country Profiles.

as Serbian).⁴⁸ Montenegro's policy choice to bring about the reduction of existing levels of dual nationality, which is significant for the purposes of state-building and community cohesion, impacts upon the citizenship regimes of the *other* neighbouring states, because it seeks exclusivity for Montenegrin citizenship in a manner which the other regimes do not.

The overlapping character of the citizenship regimes of the seven states also accounts for the sensitivities which attached in particular to the initial definition of the citizenry in each of the states at the point of independence/secession/state redefinition. As we saw in the case of the Erased in Slovenia, this was seen to pose a particular challenge in relation to the question of 'who are the citizens?', as no single state could be in any substantial respect isolated or insulated from the others. But difficulties arose more generally because there had been a number of changes to the definitions of citizenship at both the federal and the republican levels whilst socialist Yugoslavia exists, and there were subtle differences between each of the states. Many citizens were not aware of the significance of republican citizenship and the registers of citizens were often incomplete or incorrect. As a result, there were many cases in the immediate aftermath of independence of persons finding themselves involuntarily stateless because it turned out they were not registered where they expected to be, or their registration did not have the effect of giving them the citizenship of the state where they might have resided for many years, or even were born. The impact of these rules also caused profound difficulties in relation to access to property, since – as Katherine Verdery has shown – during the postsocialist transition citizenship and property rights intersected in important ways during phases of privatization as well as periods of conflict, violence and forced population mobility.⁴⁹ In the EU – i.e. where European norms of non-discrimination on grounds of nationality apply – it is, in fact, unlawful to link property ownership to nationality in that way.

4. Conclusions

The objectives of this paper have been to illuminate the key features of citizenship in the context of the European Union by reflecting upon issues from both an internal and an external perspective. This paper thus contributes to rethinking the complex effects of boundaries and boundary changes for an evolving political entity such as the EU. The paradoxical effects of the EU on borders are, as is well known, as much to redefine them as it is to remove them altogether.⁵⁰ This paper has thus ranged widely, having started with an analysis of the place of Union citizenship in the EU context, before shifting focus to look at the vertical and horizontal impact of a norms stemming from beyond the state upon the citizenship regimes of a complex region, which remains unstable and in transition even 20 years or more after the fall of the Berlin Wall.

⁴⁸ See J Dzankic, Report on Montenegro, EUDO-Citizenship, available at <http://eudo-citizenship.eu>.

⁴⁹ K Verdery, 'Transnationalism, Nationalism, Citizenship and Property: Eastern Europe since 1989', (1998) 25 *American Ethnologist* 291.

⁵⁰ N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', (2008) 6 *International Journal of Constitutional Law* 375; T Diez, 'The Paradoxes of Europe's Borders', (2006) 4 *Comparative European Politics* 235.